

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOEL MURRAY,

Plaintiff,

v.

9:03-CV-1263
(GTS/RFT)

GEORGE E. PATAKI, *et. al*,

Defendants.

APPEARANCES:

OF COUNSEL:

JOEL MURRAY, 00-A-1884

Plaintiff, *Pro Se*

Marcy Correctional Facility

P.O. Box 3600

Marcy, NY 13403

HON. ANDREW M. CUOMO

Attorney General for the State of New York

Counsel for Defendants

The Capitol

Albany, NY 12224

ADRIENNE J. KERWIN, ESQ.

GLENN T. SUDDABY, United States District Judge

DECISION and ORDER

Currently pending before the Court in this *pro se* prisoner civil rights action is Plaintiff's joint-appeal, filed on December 11, 2008, from two Decisions issued by United States Magistrate Judge Randolph F. Treece in this action. (Dkt. No. 147.) The first Decision from which Plaintiff appeals is Magistrate Judge Treece's Decision of December 5, 2008, denying Plaintiff's request for a *sixth* extension of time to serve Defendant Dr. Maria Melendez with process in this action, which was commenced more than five years ago. (Dkt. No. 146.) The second Decision from which Plaintiff appeals is Magistrate Judge Treece's Decision of October

16, 2007, denying Plaintiff's motion for sanctions against Defendants for (allegedly) failing to provide Plaintiff with Dr. Melendez's current address. (Dkt. No. 120.) Although Defendants currently have until January 20, 2009, by which to file a response to Plaintiff's joint-appeal, the Court is not in need of such a response.¹ For the reasons set forth in more detail below, after carefully reviewing the file in this action, the Court can find no error (clear or otherwise), and no abuse of discretion, in Magistrate Judge Treece's Decision of December 5, 2008. In addition, Plaintiff's appeal from Magistrate Judge Treece's Decision of October 16, 2007, is untimely and, in any event, is also without merit. As a result, Plaintiff's appeal is denied, and Magistrate Judge Treece's Decisions are affirmed.

As an initial matter, contrary to Plaintiff's understanding the Court's Decision of November 21, 2005 (Dkt. No. 66), that Decision is not properly construed as having conferred on Defendants a *duty* to provide *Plaintiff* with (1) the home address or work address of Dr. Marie Melendez, and (2) information regarding whether she had retired or been reassigned. (Dkt. No. 147, ¶ 2.) Rather, that Decision *requested* (not directed) the Office of DOCS Counsel to provide the *Clerk of the Court* with, in pertinent part, (1) the current employment status and facility assignment of a "Dr. Melendez," and (2) if she is no longer employed by DOCS, whether she has agreed to appoint DOCS Counsel as her agent for service of process in this action. (Dkt. No. 66, at 3-4.)

In any event, approximately a month after the Court made its request on November 21, 2005, the Office of DOCS Counsel complied with that request by sending the Clerk of the Court

¹ Nonetheless, should Defendants still find a need to file such a response by January 20, 2009, then they made do so, and the Court will consider amending this Decision and Order.

a letter that stated, in pertinent part, "We have not been able to identify an employee by the name of Dr. Melendez." (Dkt. No. 67.) As a result, on June 28, 2006, the Court issued a Decision that effectively shifted the burden back to Plaintiff, advising him that "unless [he] is able to provide the Court with further information regarding the identity of [Dr. Melendez], no further attempt at service can be made and [she] will be dismissed from this lawsuit." (Dkt. No. 95, at 3.) However, during the eight (8) months that followed, Plaintiff did not provide such information to the Court. (*See generally* Docket Sheet.)

As a result, on May 5, 2007, the Court (1) directed Plaintiff that he must file with the Court a letter providing information regarding the identity of Dr. Melendez by April 20, 2007, and (2) warned Plaintiff that his failure to provide that information by that time would lead the Court to recommend the dismissal of Plaintiff's claims against Dr. Melendez. (Dkt. No. 97, at 24-27; Dkt. No. 101, at 2.)

On April 1, 2007, Plaintiff provided the Court with the purported address of Dr. Melendez (at the Satellite Unit of Clinton Correctional Facility). (Dkt. No. 103.) However, that address was the same as the invalid address for Dr. Melendez provided by Plaintiff three-and-a-half years earlier. (Dkt. No. 34.) Not surprisingly, on November 21, 2007, the Summons was returned unexecuted as to Dr. Melendez due to an inability to locate her at Clinton Correctional Facility. (Dkt. Nos. 108, 127.) Nonetheless, in another extension of special solicitude to Plaintiff, the Court reissued a Summons as to Dr. Melendez on November 26, 2007. (Dkt. No. 128.) On March 11, 2008, that Summons was also returned unexecuted, with the following notation: "2/27 No longer works at [Clinton Correctional Facility]. P. Hibbs." (Dkt. No. 134.)

Five months later, on August 10, 2008, Plaintiff filed a request for a *sixth* extension of the

time for service of process on Dr. Melendez under Fed. R. Civ. P. 4(m). (*See* Dkt. Nos. 49, 66, 75, 79, 95, 144.) Plaintiff's request did not provide any new information regarding Dr. Melendez. (*Id.*) Rather, that request accused the DOCS Counsel's Office of lying about Dr. Melendez' whereabouts on December 27, 2005. (*Id.*) Plaintiff reasoned that the P. Hibbs' assertion (presumably made on February 27, 2008) that "[Dr. Melendez] [n]o longer works at [Clinton Correctional Facility]" contradicts the Office of DOCS Counsel's assertion (made on December 27, 2005) that "[w]e have not been able to identify an employee by the name of Dr. Melendez." (*Compare* Dkt. No. 134 with Dkt. No. 67.)

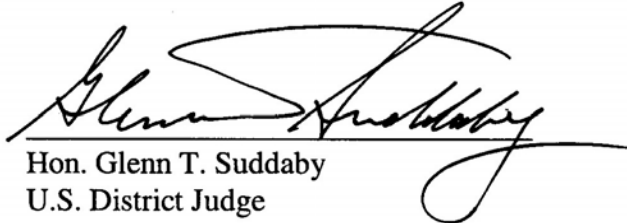
The Court finds no contradiction between the two referenced factual assertions. Both assertions are consistent with the apparent fact that Dr. Melendez stopped working at Clinton C.F. before December 27, 2005 (and that her prior employment was recalled by P. Hibbs on February 27, 2008). It should be noted that the apparent fact Dr. Melendez stopped working at Clinton C.F. before December 27, 2005, is also consistent with the fact that, on or about June 14, 2004, the United States Marshal's Service reported that they did not find her at Clinton C.F. (Dkt. No. 34.)

Finally, contrary to Plaintiff's characterization of Magistrate Judge Treece's Decision of December 5, 2008, that Decision was *not* a dismissal of Plaintiff's claim against Dr. Melendez. (Dkt. No. 147, ¶ 3.) Rather, that Decision was a denial of Plaintiff's request for a sixth extension of time to serve her. (Dkt. No. 146.) Indeed, Magistrate Judge Treece's Decision expressly granted Plaintiff thirty (30) days in which to brief Magistrate Judge Treece as to whether or not he should recommend dismissal of Plaintiff's claims against Dr. Melendez—an opportunity that Plaintiff has apparently chosen not to pursue. (*Id.* at 4-5.)

ACCORDINGLY, it is

ORDERED that, for the reasons set forth above in this Decision and Order, Plaintiff's appeal from United States Magistrate Judge Randolph F. Treece's Decisions of December 5, 2008, and October 16, 2007 (Dkt. No. 147) is **DENIED**, and those Decisions (Dkt. Nos. 120 and 146) are **AFFIRMED**.

Dated: January 6, 2009
Syracuse, New York



Hon. Glenn T. Suddaby
U.S. District Judge